Filed 3/14/16 P. v. Anderson CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

ANDREW RYAN ANDERSON,

Defendant and Appellant.

F068777

(Super. Ct. No. VCF270655)

OPINION

APPEAL from a judgment of the Superior Court of Tulare County. Valeriano Saucedo, Judge.

Robert L. S. Angres, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Eric L. Christoffersen and John G. McLean, Deputy Attorneys General, for Plaintiff and Respondent.

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Appellant Andrew Ryan Anderson was convicted of false imprisonment by force or violence, assault by means of force likely to produce great bodily injury, unlawful sexual intercourse, sodomy of a person under the age of 18, sending harmful matter for

the purpose of seducing a minor, and witness intimidation. In this appeal he challenges, on grounds of insufficiency of evidence, his convictions on three counts of sending harmful matter for the purpose of seducing a minor. The People concede the argument, and we reverse these convictions. Anderson also challenges his sentence for false imprisonment by force or violence. He argues the trial court should have stayed his sentence for this offense pursuant to Penal Code[1] section 654, in light of his conviction and aggravated sentence for assault by means of force likely to produce great bodily injury. We reject this argument because the trial court's implicit conclusion that Anderson had separate objectives in committing the false-imprisonment and assault offenses is supported by substantial evidence. In sum, Anderson's convictions on counts 7, 8, and 9 are reversed, and, in all other respects, the judgment is affirmed.

FACTS AND PROCEDURAL HISTORY[2]

In June 2009, Anderson, who was 18 years of age, began a relationship with 14-year-old A.L. Thereafter, the two had an on-and-off sexual relationship until July 16, 2012. In the course of the relationship, Anderson texted A.L. photographs of his penis, and she texted him topless photographs of herself. Evidence presented at the trial in this matter also revealed that Anderson was abusive and controlling during the relationship: He objected to A.L. wearing makeup or revealing clothes; limited her time with her friends; and beat her on several occasions, threatening to kill her and her family if she told anyone about the beatings.

Ultimately, the relationship between Anderson and A.L. ended because of an incident that took place on July 16, 2012, which also led to the charges in this matter. That morning, between 8:00 a.m. and 9:00 a.m., Anderson picked A.L. up from her home

[1]Subsequent statutory references are to the Penal Code unless otherwise specified.

[2]Since Anderson challenges only his convictions for sending harmful matter for the purpose of seducing a minor and his sentence for false imprisonment, we will outline an abbreviated version of the facts as relevant to the issues raised by Anderson.

and drove to a secluded orange grove. A.L. went with Anderson only because he threatened to beat her up if she did not. Anderson parked the car within the grove, asked A.L. some questions, and quickly grew angry. A.L. was sitting in the car's passenger seat, while Anderson was standing outside the car, next to the passenger-side door, which was open. A.L. testified that Anderson proceeded to "beat [her], badly," striking her on both sides of the head with closed fists, "like maybe [10] times to each side," and that the beating continued for "[a] good half an hour, 20 minutes." A.L. stated she responded by "trying to cover [her] face up" and "push him away," but Anderson was "just way stronger than [she was]." Asked how the attack ended, A.L. explained, "[h]e had pulled me out of the car and I fell onto the ground. Then he picked me back up and he threw me into the back seat of the car. And then I was still covering my face, and then I moved my hands and he hit me one last time in my mouth and busted my lip, and then that was it." Finally, A.L. described her injuries as follows: "I had two black eyes, my top lip and bottom lips were busted. I had bruises all over both sides of my head. My forehead was swollen—the sides of my face were swollen out, like the forehead and sides of my face were just puffy, swollen everywhere."

Anderson and A.L. remained at the orange grove until about 6:00 p.m. A.L. testified that they remained in the grove for such a long time because Anderson did not want anyone to see her injuries. She explained that she "was just sitting there most of the time having [her] eyes closed," and Anderson was "walking around the car, pacing back and forth, sitting there." Finally, they left the grove and Anderson took a room at a hotel for them. Thereafter, they went to a Taco Bell and a Pick and Go gas station to buy food. Upon returning to the hotel about 7:00 p.m., they watched television; A.L. kept asking Anderson to let her go because her parents and friends would be looking for her. When asked why she did not leave when, for example, they were at the gas station or when Anderson was checking into the hotel, A.L. testified as follows: "I didn't run away—every single time I would run away from him in the past, he would always catch me and

he would beat me up worse than he would have before. [¶] … [¶] … He would have caught me. He was always so much faster and stronger than me."

Eventually A.L.'s friends, who were concerned about her disappearance, started calling Anderson's cell phone because A.L.'s cell phone was dead. Around midnight, Anderson permitted A.L. to call her friends to have them pick her up at a gas station next to the hotel. Shortly thereafter, A.L. met her friends at the gas station and went to a friend's house, where she was joined by her parents and the police. The instant charges followed.

Anderson was charged by information with kidnapping (§ 207, subd. (a), count 1); assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(4), count 2); unlawful sexual intercourse (§ 261.5, subd (c), counts 3-5); sodomy of a person under the age of 18 (§ 286, subd. (b)(1), count 6); sending harmful matter for the purpose of seducing a minor (§ 288.2, subd. (b), counts 7-9); using a minor to perform prohibited acts (§ 311.4, subd. (c), counts 10-13); and witness intimidation (§ 136.1, subd. (c)(1), count 14).

Anderson was acquitted by a jury of the charges, in counts 10 through 13, of using a minor to perform prohibited acts. As to the kidnapping charge in count 1, he was found guilty of the lesser-included offense of false imprisonment by force or violence. (§§ 236, 237.) The jury returned guilty verdicts on the remaining counts.

Anderson was sentenced to a total term of 10 years 4 months, computed as follows: the upper term of four years for assault likely to produce great bodily injury; a consecutive one-year term for intimidating a witness (one-third the middle term); and consecutive eight-month terms on the remaining eight counts, i.e., false imprisonment by force or menace; three counts of unlawful sexual intercourse; sodomy of a person under the age of 18; and three counts of sending harmful matter to a minor (one-third the middle term for each count). The court imposed a restitution fine of $10,000, suspended

the imposition of a parole-revocation fine in the same amount, and ordered Anderson to register as a sex offender pursuant to section 290.

DISCUSSION

I. Anderson's convictions for sending harmful matter in order to seduce a minor

Anderson was convicted of three counts of sending harmful matter for the purpose of seducing a minor pursuant to section 288.2, subdivision (a), based on the fact that he texted photographs of his penis to A.L. on three occasions between June 1, 2009 and July 16, 2012. Anderson argues that his convictions under section 288.2 must be reversed for insufficient evidence because the photographs of his penis do not meet the applicable definition of harmful matter, which closely tracks the standard for obscene material articulated by the United States Supreme Court. The People concede the argument. We agree with the parties and reverse Anderson's convictions on counts 7, 8, and 9.

A. Statutory framework

At the time of the relevant events, as well as at the time of trial, section 288.2, subdivision (a), provided, in pertinent part:

> "Every person who, with knowledge that a person is a minor … knowingly distributes, sends, causes to be sent, exhibits, or offers to distribute or exhibit by any means, including, but not limited to, live or recorded telephone messages, any harmful matter, as defined in Section 313, to a minor with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of that person or of a minor, and with the intent or for the purpose of seducing a minor, is guilty of a public offense …." (Former § 288.2, subd. (a).)

"Harmful matter" is defined in section 313 as follows:

> "'Harmful matter' means matter,[**3**] taken as a whole, which to the average person, applying contemporary statewide standards, appeals to the prurient

3Section 313, subdivision (b), further defines "'[m]atter'" as including "any picture, drawing, photograph, motion picture, or other pictorial representation …."

> interest, and is matter which, taken as a whole, depicts or describes in a patently offensive way sexual conduct and which, taken as a whole, lacks serious literary, artistic, political, or scientific value for minors." (§ 313, subd. (a).)

At trial, the prosecutor argued that the "harmful matter" at issue for purposes of the section 288.2 charges consisted of the photographs of his penis that Anderson texted to A.L. Anderson acknowledges on appeal that the record, "[w]hen viewed in a light most favorable to the judgment," establishes he texted photographs of his penis to A.L. on at least three occasions. The issue is whether these photographs constitute "harmful matter" within the meaning of section 313, and, in turn, section 288.2, subdivision (a).

In order to comport with federal constitutional requirements, section 313's definition of "harmful matter" tracks the test for obscene materials set forth by the United States Supreme Court in *Miller v. California* (1973) 413 U.S. 15 (*Miller*). Under the *Miller* test, for material to be obscene, the trier of fact would make an affirmative finding under each of the following three prongs: "(a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest [citations]; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." (*Id.* at p. 24.)

The *Miller* standard and the applicable definition of "harmful matter" in section 313 are "virtually identical" except that, under section 313, the community standard used to evaluate the material at issue is a "statewide" standard, and, for material to be harmful, it "must lack serious literary, artistic, political, or scientific value *for minors.*" (*People v. Dyke* (2009) 172 Cal.App.4th 1377, 1383 (*Dyke*).) Indeed, although section 313 modifies the third prong of the *Miller* test such that the socially redeeming value of the work at issue is assessed in relation to the sensibilities of minors, the first two prongs incorporate the adult standard enunciated in *Miller*. (*People v. Powell* (2011)

194 Cal.App.4th 1268, 1274 (*Powell*) ["Harmful matter, for purposes of section 288.2, essentially means obscene material as defined in *Miller* … but with … a gloss that the material must have no redeeming value within the meaning of *Miller* for the benefit of minors."]; *Dyke, supra,* at p. 1383 ["As to the first two prongs of the test for harmful matter, nothing in section 313 indicates that the 'average person' applying 'contemporary statewide standards' is anything other than an average *adult* applying *adult* standards, or that the determination of whether sexual conduct is depicted or described in a patently offensive way should be made using anything but *adult* standards."].) "In essence then, to fall within the terms of section 288.2, subdivision (a), the material exhibited to the minor must be 'obscene' as defined by *Miller*, except that its socially redeeming values must be of a nature that can be appreciated by a minor." (*Dyke, supra,* at p. 1383.)

B. Sufficiency of the evidence

When the sufficiency of the evidence supporting a conviction is challenged on appeal, "the court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578.)

In the instant matter, the content at issue for purposes of the "harmful matter" element of the offenses is depictions of Anderson's penis. *Miller* specifies that, under its definition of obscenity, "no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct specifically defined by the regulating state law, as written or construed." (*Miller, supra,* 413 U.S. at p. 27.) With reference to *Miller,* the People concede that the simple depictions of Anderson's penis at issue are not patently offensive by adult standards and, consequently, do not meet the definition of "harmful matter" set forth in section 313. (See *Dyke, supra,* 172 Cal.App.4th at p. 1385 ["applying a contemporary

adult standard, nudity alone is not per se obscene"]; *Powell, supra,* 194 Cal.App.4th at p. 1291 ["[N]udity or depictions of sexual intercourse or other sexual activity do not, by themselves, make a movie obscene."].) In light of the People's concession that the images at issue do not constitute "harmful matter" within the meaning of section 313, there is insufficient evidence to support Anderson's convictions under section 288.2, subdivision (a). Accordingly, we reverse Anderson's convictions on counts 7, 8, and 9.

II. Anderson's sentences for false imprisonment and assault

The trial court sentenced Anderson to the upper term of four years in prison on his conviction for assault with force likely to produce great bodily injury (§ 245, subd. (a)(4), count 2) and a subordinate term of eight months (one-third the middle term) on his conviction for false imprisonment (§§ 236, 237, count 1). Anderson argues the trial court erred in failing to apply section 654 to stay the sentence on his conviction for false imprisonment "because that offense facilitated [the] assault [on] A.L. in the grove."

Section 654 prohibits separate punishment for crimes arising from an indivisible course of conduct where the crimes were merely incidental to, or were the means of accomplishing or facilitating, one objective. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1208; *People v. Harrison* (1989) 48 Cal.3d 321, 335.) On the other hand, when a defendant commits crimes in pursuit of multiple criminal objectives, he may separately be punished for crimes related to different objectives even if the crimes involved common acts or comprised an otherwise indivisible course of conduct. (*Harrison*, *supra*, at p. 335.) The defendant's intent and objective are factual questions for the trial court to resolve, and we will uphold its ruling on these matters if it is supported by substantial evidence. (*People v. Coleman* (1989) 48 Cal.3d 112, 162.)

Here, sometime between 8:00 and 9:00 a.m. on the morning of July 16, 2012, Anderson took A.L., against her will, to a secluded orange grove where he beat her about the head with closed fists. He kept her at the orange grove all day and thereafter took her to a hotel until midnight. A.L. testified that, during the time at the orange grove, she and

Anderson mostly sat in the car; at the hotel, they watched television. She testified that she repeatedly asked Anderson to let her go because her friends and family would be looking for her, but Anderson refused. Anderson finally let A.L. go when her friends started calling him on his cell phone, asking about A.L.'s whereabouts. A.L. testified that Anderson kept her with him all day and through the evening because he did not want anyone to see her bruised and swollen face. In sentencing Anderson for assaulting A.L. and falsely imprisoning her, the trial court implicitly found that Anderson had different objectives in committing these offenses. In light of A.L.'s testimony, the trial court could reasonably have concluded that Anderson prevented A.L. from leaving until midnight so as to delay detection by her family of the assault and, in turn, by law enforcement authorities. (See, e.g., *People v. Nichols* (1994) 29 Cal.App.4th 1651, 1657-1658 [separate punishments for kidnapping and threatening victim were proper under § 654 because in threatening victim, defendant had distinct objective of dissuading him from reporting kidnapping]; *People v. Nguyen* (1988) 204 Cal.App.3d 181, 193.) Since the trial court's implicit determination that Anderson had different objectives in committing these offenses is supported by substantial evidence, we will not disturb Anderson's sentences on counts 1 and 2.

DISPOSITION

Anderson's convictions on counts 7, 8, and 9 are reversed. The matter is remanded for resentencing consistent with this opinion. The judgment is affirmed in all other respects.

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Smith, J.

WE CONCUR:

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Levy, Acting P.J.

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Kane, J.